be appropriate to immediately alleviate the danger to public health and safety.

(3) Only proven technology for subsidence and mine opening control should be employed.

d. Radiation Emission—Where radiation might be a potential public health or safety problem, the primary consideration should be to assure proper coordination with other agencies concerned with radioactive waste management prior to reclamation activity. At a minimum the following agencies should be consulted; U.S. Environmental Protection Agency, Nuclear Regulatory Commission, National Council on Radiation Protection, State Nuclear Regulatory Agency (if any), State Health Department, and Tribal Environmental Office (if any).

e. Domestic Water Supplies.

(1) Specific reclamation control measures designed to protect or restore domestic water supplies are site specific in nature. Control strategies are dependent on a variety of variables including but not limited to—

(a) The number of people affected,

(b) The type of pollutant(s),

(c) The concentration of pollutant(s),

(d) The technology available to control the pollution, and

(e) The cost to control the pollution.

(2) If at all possible, expenditure of Title IV funds to clean-up or restore domestic water supplies should be restricted to at-source control methodologies.

f. Surface and Underground Mine Fires.

(1) Only fires associated with abandoned mines can be controlled or extinguished with funds within the context of Title IV of the Act. Virgin coal outcrop fires cannot be addressed.

(2) Prior to initiating extinghishment efforts, geologic investigations should be carried out to determine the amount of remaining combustible material and to delineate the extent of the existing fire.

g. Hazardous Gases and Particulates.

(1) The introduction of toxic gases such as CO, CO_4, CH_4, SO_2, H_2S, NH_3, HC and particulates can adversely affect health, visibility, and inhibit plant growth.

(2) Specific control procedures will vary with the site. Treatment measures should take into consideration local physiographic and atmospheric conditions.

(3) The expertise and data that can be provided by local, State, and tribal air pollution control agencies should be considered.

(4) Only proven technology for controlling hazardous gases and particulates resulting from past mining practices should be employed.

8. Aesthetic and Visual Values

a. The administering agency should conduct an aesthetic evaluation which should include but not be limited to—

(1) The adversity and/or desirability of the visual impact; the components of this evaluation include—

(a) Viewing distance,

(b) Disparity of land forms,

(c) Disparity of textures, and

(d) Color contrasts— seasonal variations.

(2) The viewing audience; this includes—

(a) Number of observers, and

(b) Nature of viewing audience and their expectations.

(3) Proximity to public facilities and other high use areas; this includes—

(a) Transportation facilities,

(b) Parks and recreation areas,

(c) Public forests,

(d) Urban areas, and

(e) Tourist attractions.

b. Reclamation activities should include landscaping techniques to visually improve the project area and should address the following visual degraders:

(1) Highwalls,

(2) Bare, eroding soils/spoil,

(3) Discolored water,

(4) Haul roads,

(5) Off-site sedimentation,

(6) Deep mine openings,

(7) Refuse piles,

(8) Abandoned structures,

(9) Slurry ponds and sediment basins,

(10) Stockpile areas,

(11) Abandoned mining equipment and debris,

(12) Garbage and refuse dumps,

(13) Open pits, and

(14) Deforestation.

c. Most solutions for aesthetic problems should involve movement of material and the planting of vegetation. The strategic placement of screening materials and vegetation and the determination of which plant species have the necessary combinations of form, texture, color, size, and adaptability to the growing conditions will be a key step in the reclamation planning. Guidelines and standards to evaluate visual resources have been developed by agencies, including the U.S. Forest Service, U.S. Soil Conservation Service, U.S. Bureau of Land Management, National Park Service and the Heritage Conservation and Recreation Service, and may be adapted for use in evaluating and planning visual solutions on abandoned mine land projects. Some solutions for aesthetic problems may include—

(1) Revegetation with screening trees and shrubs, herbaceous plants, and combinations thereof;

(2) Off-site screening;

(3) Reduction and/or reshaping of outslopes;

(4) Stream restoration;

(5) Disposal of abandoned mining and processing equipment and debris; and

(6) Reshaping and revegetation of bare eroded areas.

9. Fish and Wildlife Values

a. The administering agency should review information provided by the conservation and land management agencies having responsibilities for fish and wildlife or their habitats to determine the pre-reclamation fish and wildlife values of each abandoned mine land project. The administering agency should then determine the fish and wildlife values for each project.

b. The administering agency should incorporate fish and wildlife values into project reclamation plans, where appropriate.

c. The selected reclamation plan should be discussed with the landowners/or users before reclamation begins.

d. The administering agency should insure that all fish and wildlife measures contained in the selected plan are implemented and encourage the landowner(s) to maintain them at or above the planned fish and wildlife values.

10. Air Quality

a. All reclamation activities should be conducted in accordance with applicable local, State, tribal, or Federal air quality standards.

b. Local, State, tribal, or Federal air quality officials should be contacted prior to reclamation planning activities for requirements concerning air quality permit procedures, applicable standards, and possible control measures.

c. Long-term air quality improvements which will result from reclamation should have priority over possible short-term air quality degradation caused by reclamation construction.

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federal register

Tuesday
November 6, 1979

Part VII

Environmental Protection Agency

Extension of Compliance Date for Emission Standards Applicable to JT3D Engines; Final Rule

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 87

[FRL 1323-1]

Control of Air Pollution From Aircraft and Aircraft Engines; Extension of Compliance Date for Emission Standards Applicable to JT3D Engines

AGENCY: Environmental Protection Agency.

ACTION: Final rulemaking.

SUMMARY: This action amends 40 CFR 87.31(c) to extend the final compliance date for smoke emission standards applicable to the JT3D aircraft engines from September 1, 1981 to January 1, 1985. This compliance schedule is compatible with the FAA noise operating rule applicable to most aircraft using the JT3D engine that are not flown in foreign commerce (14 CFR Part 91). The proposed amendment to 40 CFR 87.31(c) was published as a Notice of Proposed Rulemaking on March 24, 1978 (43 FR 12815).

EFFECTIVE DATE: January 7, 1980.

FOR FURTHER INFORMATION CONTACT: Dr. Richard Munt, Emission Control Technology Division, Office of Mobile Source Air Pollution Control, Environmental Protection Agency, 2565 Plymouth Road, Ann Arbor, Michigan 48105, (313) 668-4378.

SUPPLEMENTARY INFORMATION: On July 17, 1973, the Environmental Protection Agency (EPA) promulgated 40 CFR Part 87 establishing aircraft emission standards and test procedures (38 FR 19088). One provision of Part 87 is § 87.31(c), which is applicable to exhaust emissions of smoke from JT3D engines (Class T3). This provision was originally scheduled to take effect January 1, 1978.

On September 5, 1974, the Air Transport Association of America (ATA) submitted a petition to the EPA on behalf of 11 member airlines asking that the implementation date for this requirement be set back to March 1, 1981, and proposed that each operator of class T3 engines (class T3 engines, designated JT3D by the manufacturer, are those that are used principally on Boeing 707 and McDonnell-Douglas DC-8 aircraft) accomplish the necessary engine modifications in accordance with a plan approved by the EPA Administrator. This petition was based upon the need to respond to the anticipated delay in the availability of hardware as a consequence of technical problems encountered by the manufacturer, Pratt and Whitney, during the initial service evaluation.

In response to this petition, EPA promulgated a revision to the aircraft standards in December 1976 (42 FR 54861) permitting a phased compliance schedule, culminating in complete compliance by September 1, 1981.

In 1977, during the interagency review of the draft NPRM for a comprehensive revision of all aspects of the aircraft standards, it was suggested by the FAA that JT3D-powered aircraft, which are scheduled to be replaced as a part of the FAA noise reduction program be exempted from compliance with the smoke standards for JT3D engines (40 CFR 87.31(c)). This suggestion was incorporated in the NPRM published on March 24, 1978 (43 FR 12815). Without such an exemption, the airlines would be burdened with a costly modification program ($21 million total cost) by September 1981, only to have those engines replaced three years later in order to comply with the FAA noise rule. Specifically, the NPRM proposed a compliance schedule for smoke control identical to that required for compliance with the FAA noise rule by airplanes operated under FAR Parts 121 and 135 which are not operated in foreign commerce. It should be noted that airplanes operated under FAR Part 91 and those operated in foreign commerce would be covered by the same proposed schedule. This would result in the retrofit or replacement of all JT3D engines for smoke control by January 1, 1985, while all JT3D-powered airplanes not in foreign commerce would be in compliance with the noise requirements by that date.

Comments favorable to this proposed delay were received from the Air Transport Association and the International Air Transport Association (IATA). However, these organizations, as well as the European Civil Aviation Conference (ECAC), did express a preference that the rule be dropped altogether in agreement with the format of the proposed rules of the International Civil Aviation Organization (ICAO) which excludes any and all retrofit rules. The IATA and ECAC also voiced the opinion that the rule should not apply to foreign aircraft operating in the U.S. The issue, though, is whether to delay the smoke rule and not whether to have the rule: It is already promulgated.

The EPA is proceeding now with final rulemaking in order to provide guidance to the operators of JT3D-powered aircraft in this matter while other aspects of the March 1978 NPRM are still under review.

The primary effect of this action is to postpone for three years the elimination of visible smoke from most Boeing B707, B720 and McDonnell-Douglas DC-8 aircraft. At the end of that time, either the engines will have been modified for smoke and noise reductions, replaced by other engines which would meet both EPA smoke standards and FAA noise standards, or the entire aircraft will have been replaced by newer aircraft meeting the smoke and noise standards. Thus, the final effect is unchanged. The delay does not have serious consequences insofar as visible smoke is concerned, for by 1985 the B707 and DC-8 aircraft will have dropped from 20 percent of the fleet today, to only 7 percent. Such aircraft would then account for less than 5 percent of the total takeoffs (when visible smoke emissions are most troublesome), because they are used for long range flight and undergo fewer landing-takeoff cycles.

This revision may provide considerable savings in cost to the airlines. The cost for a retrofit of the entire 1981 fleet of JT3D-powered aircraft is estimated to be $21 million which would be totally lost by 1985 if, as is most likely, all affected aircraft are either retired or re-engined from compliance with the FAA noise rule.

Postponement of this smoke rule will add to the hydrocarbon and carbon monoxide burden imposed on the air quality regions surrounding major airports. This additional burden occurs because the low-smoke combustors which would be installed also reduce the emissions of those gaseous pollutants, especially during taxiing and idling of the aircraft at the airport. The delay, then, will result in the continued use of the higher-polluting combustors (of hydrocarbons and carbon monoxide) for an additional 3 years and 4 months. This effect is short term, however, as the engines will either be modified or replaced by 1985 (most likely the latter as fuel efficient replacement engines make this an attractive alternative). The additional national emissions that will result from the delay have been estimated to be 17,000 and 5,300 tons per year for hydrocarbons and carbon monoxide, respectively (assuming engine modification, not replacement). On the other hand, the eventual replacement of these engines by newer ones meeting the EPA gaseous emission standards will result in a large emission savings, roughly 30,000 and 20,000 tons per year for hydrocarbons and carbon monoxide, respectively.

Delay in the full compliance with the noise rule beyond January 1, 1985 will

not be considered a sufficient reason for the further delay in the smoke retrofit schedule because a certifiable hardware design and ample time for retrofit are both available.

The contents of this rulemaking have been coordinated with the Secretary of Transportation in order to assure appropriate consideration of aircraft safety. There will be continuing consultation on this issue between this Agency and that Department until full compliance is achieved. Should the Secretary of Transportation determine at any point that the emission standard cannot be met within the specified time without creating a safety hazard, appropriate modifications will be made to the standard or its effective date.

Availability of Documents

Copies of EPA's Summary and Analysis of Comments to the NPRM and supporting documentation are available for inspection and copying at the U.S. Environmental Protection Agency, Central Docket Section, Room 2903 (Docket No. OMSAPC–78–1), 401 M Street, SW., Washington, D.C. 20460. As provided in 40 CFR Part 2, a reasonable fee may be charged for copying services.

Dated: October 30, 1979.

Douglas M. Costle,

Adminstrator, Environmental Protection Agency.

Part 87, Chapter I of Title 40 of the Code of Federal Regulations is amended as follows:

1. Section 87.31(c) is revised to read as follows:

§ 87.31 Standards of exhaust emissions.

* * * * *

(c) Exhaust emissions of smoke from each in-use aircraft gas turbine engine of Class T3 shall not exceed a smoke number of 25. Each operator shall achieve compliance in accordance with the following schedule:

(1) One quarter of its operational Class T3 engines by January 1, 1981.

(2) One half of its operational Class T3 engines by January 1, 1983.

(3) All of its operational Class T3 engines by January 1, 1985.

This compliance schedule notwithstanding, Class T3 engines which do not meet a smoke number of 25 may continue to be operated if, under an FAA approved plan, replacement engines or replacement airplanes have been ordered and are scheduled for delivery prior to January 1, 1985, but not after the dates specified in the plan. For the purpose of this paragraph, replacement engines are engines of a class different from Class T3 and have been shown to meet the smoke emission standards in this part appropriate to their class.

(Secs. 231, 301(a), Clean Air Act, as amended (42 U.S.C. 7571, 7601(a)))

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Tuesday
November 6, 1979

Part VIII

Department of Energy

Contract Appeals; Rules of Practice; Final Rule

DEPARTMENT OF ENERGY

10 CFR Part 1023

Contract Appeals; Rules of Practice; Final Rule

AGENCY: Department of Energy, Board of Contract Appeals.

ACTION: Rules of practice. Final rule.

SUMMARY: These regulations revise the rules of practice of the Department of Energy Board of Contract Appeals. They reflect new procedures required by the Contract Disputes Act of 1978, Pub. L. 95–563, 92 Stat. 2383, 1978 (41 U.S.C. 601). The revised rules also incorporate substantial portions of the Uniform Rules of Procedures for Boards of Contract Appeals issued as guidelines by the Office of Federal Procurement Policy on May 31, 1979 (44 FR 34227, June 14, 1979). In addition, these rules reflect the comments received to the Supplemental Interim Rules of Practice for the Board issued and published for comments on Friday, August 17 at 44 FR 48163.

EFFECTIVE DATE: October 17, 1979.

FOR FURTHER INFORMATION CONTACT: John B. Farmakides, Chairman, Energy Board of Contract Appeals, Webb Bldg., Room 1006, 4040 North Fairfax Drive, Arlington, VA 22203. Telephone 703–235–2700.

SUPPLEMENTARY INFORMATION: These regulations are intended to provide rules and procedures for contract appeals filed pursuant to the Contract Disputes Act of 1978 (Act), or, where pursuant to that Act, an appellant elects the option to proceed in accordance with the Act. These rules do not replace or supersede the rules of practice and procedure set out at 41 FR 12215 issued on March 24, 1976 (10 CFR Part 703) which will continue to be used in appeals involving contracts for which an election under the Act is not available, or is not made.

These revised rules substantially incorporate the guidelines issued by the Office of Federal Procurement Policy (OFPP), except that the Board has continued some of its earlier rules, where, based on past favorable experience they are simpler, easier to understand, and are consistent with the intent for impartial, and timely resolution of appeals under the Act. Those areas of change were noted in detail in the earlier publication of the interim rules for public comment at 44 FR 48163 (August 17, 1979), and will not be repeated here except to note that the comments received were heavily in favor of the Board's proposed rules. The majority of comments received related to Rule 4 and voiced support for that Rule as proposed by the Board. Therefore, the requirement in the OFPP's guidelines calling for the "appeal file" to be placed automatically into evidence subject to right of appellant to object is not followed. Instead, under the Board's Rule 4 the preparation of the appeal file is treated in the same manner as provided by OFPP except that, in accordance with the Federal Rules of Evidence, it does not become part of the evidentiary record until offered and admitted into evidence. Also consistent with past favorable experience, the limiting dates for submitting pleadings under Rule 7 are revised to run from the date notice is received that an appeal has been docketed.

DRAFTING INFORMATION: The principal persons involved in drafting these regulations are: John B. Farmakides, Chairman; Carlos R. Garza, Vice Chairman; and Beryl S. Gilmore, Member, Department of Energy, Board of Contract Appeals.

Issued in Washington, D.C., on October 29, 1979.

John B. Farmakides,

Chairman, Board of Contract Appeals.

Accordingly, in 10 CFR, new Part 1023 is revised to read as follows:

PART 1023—CONTRACT APPEALS

Subpart A—Rules of the Board of Contract Appeals

Preface

Sec.

Authority: Pub. L. 95–91, sec. 301, 91 Stat. 577; Pub. L. 95–563; EO 10789.

Subpart A—Rules of the Board of Contract Appeals

Preface

§ 1023.1 Scope and purpose.

These rules are intended to govern all appeals procedures before the Department of Energy Board of Contract Appeals (Board) which are within the coverage of the Contract Disputes Act of 1978 (Pub. L. 95–563, Nov. 1, 1978).

§ 1023.2 Effective date.

These rules shall apply to all appeals relating to contracts which are subject to the Contract Disputes Act of 1978 and entered into on or after March 1, 1979. At the contractor's election, they shall also apply to appeals relating to earlier contracts, if such contracts are subject to the Contract Disputes Act of 1978, and the appeal relates to claims pending before the contracting officer on March 1, 1979.

§ 1023.3 Jurisdiction for considering appeals.

(a) The Department of Energy Board of Contract Appeals (referred to herein as the "Board" or "EBCA") shall consider and determine appeals from decisions of contracting officers pursuant to the Contract Disputes Act of 1978 (Pub. L. 95–563, 41 U.S.C. 601–613, also hereinafter referred to as the "Act") relating to contracts made by (1) the Department of Energy or (2) any other executive agency when such agency or the Administrator for Federal Procurement Policy has designated the Board to decide the appeal. In addition, the Board shall consider and determine appeals from decisions of contracting officers arising from other contracts which include an appropriate disputes clause.

(b) The Board may consider and determine other matters, not inconsistent with its statutory duties, as assigned by the Secretary.

(c) In each proceeding the Board shall make a final decision which is impartial, fair and just to the parties based on the record of the case.

§ 1023.4 Organization and location of the Board.

(a) The Board is located in the Washington, D.C. metropolitan area and its address is: Webb Building, Room 1006, 4040 N. Fairfax Drive, Arlington, Virginia 22203.

(b) The Board consists of a Chair, a Vice Chair, and other members, all of whom are attorneys-at-law duly licensed by any state, commonwealth, territory, or the District of Columbia. Members of the Board are selected and appointed to serve in the same manner as hearing examiners pursuant to Section 3105 of title 5, United States Code with an additional requirement that each member shall have had not fewer than five years experience in public contract law. Members are designated Administrative Judges and the Chair, Chief Administrative Judge.

(c) The Administrative Judge assigned to hear and develop the record on an appeal has authority to act for the Board in all matters with respect to such appeal that are not dispositive of the appeal.

(d) Except for appeals considered under the expedited small claims or accelerated procedures, appeals are assigned to a panel of three

Administrative Judges of the Board who decide the case by a majority vote.

§ 1023.5 Ex-parte conduct.

Written or oral communications with the Board by or for one party without participation or notice to the other, is not permitted. No member of the Board or of the Board's staff shall consider nor shall any person, directly or indirectly involved in an appeal, submit to the Board or to the Board's staff, off-the-record, any evidence, explanation, analysis, or advice (whether written or oral) regarding any matter at issue in an appeal. This provision does not apply to consultation between Board members nor to communications concerning the Board's administrative functions or procedures.

§ 1023.6 General guidelines.

(a) It is impractical to articulate a rule to fit every circumstance which may be encountered. Accordingly, these rules will be interpreted and applied consistent with the Board's policy to provide for the just, speedy, and inexpensive determination of appeals.

(b) It is the Board's objective to encourage full disclosure of all relevant facts and to discourage surprise.

(c) Each specified time limitation is a maximum, and should not be fully used if the action described can be accomplished in a shorter period. Informal communication between the parties is encouraged to reduce time periods as much as possible.

(d) The Board shall conduct proceedings so as to assure compliance with the security regulations and requirements of the Department or agency involved.

§ 1023.20 Rules of practice.

The following rules of practice shall govern the procedure as to all contract disputes appealed to this Board in accordance with this subpart:

Preliminary Procedures

Rule

1 Appeals, how taken.
2 Notice of appeal, contents.
3 Docketing of appeals.
4 Contracting officer appeal file.
5 Motions.
6 Appellants election of procedure.
7 Pleadings.
8 Amendments of pleadings or record.
9 Hearing election.
10 Submission of appeal without a hearing.
11 Prehearing briefs.
12 Prehearing conference.
13 Optional Small Claims (Expedited) procedure.
14 Optional Accelerated procedure.
15 Settling the record.
16 Discovery—General.
17 Discovery—Depositions, interrogatories, admissions, production and inspection.
18 Subpoenas.
19 Time and service of papers.

Hearings

20 Hearings—Time and place.
21 Hearings—Notice.
22 Hearings—Unexcused absence of a party.
23 Hearings—Rules of evidence and examination of witneses.

Representation

24 Appellant.
25 Respondent.

Decisions

26 Decisions.
27 Motion for reconsideration.
28 Remand from court.

Dismissals

29 Dismissals without prejudice.
30 Dismissal for failure to prosecute.

Sanctions

31 Failure to obey Board order.

Preliminary Procedures

Rule 1 Appeals, How Taken. (a) Notice of an appeal shall be in writing and mailed or otherwise furnished to the Board within 90 days from the date of receipt of a contracting officer's decision. A copy of the notice shall be furnished at the same time to the contracting officer from whose descision the appeal is taken.

(b) Where the contractor has submitted a claim of $50,000 or less to the contracting officer and has requested a written decision within 60 days from receipt of the request, and where the contracting officer has not done so, the contractor may file a notice of appeal as provided in subparagraph (a) above, citing the failure of the contracting officer to issue a decision.

(c) Where the contractor has submitted a claim in excess of $50,000 to the contracting officer and the contracting officer has failed to issue a decision within a reasonable time, the contractor may file a notice of appeal as provided in subparagraph (a) above, citing the failure to issue a decision.

(d) Upon docketing of appeals filed pursuant to (b) or (c) of this Rule, the Board, at its option, may stay further proceedings pending issuance of a final decision by the contracting officer within the time fixed by the Board, or order the appeal to proceed without the contracting officer's decision.

Rule 2 Notice of Appeal, Contents. A notice of appeal must indicate that an appeal is being taken and must identify the contract (by number), and the department, administration, agency or bureau involved in the dispute, the decision from which the appeal is taken, and the amount in dispute, if known. The notice of appeal should be signed by the appellant (the contractor making the appeal), or by the appellant's duly authorized representative or attorney. The complaint referred to in Rule 7 may be filed with the notice of appeal, or the appellant may designate the notice of appeal as a complaint, if it otherwise fulfills the requirements of a complaint.

Rule 3 Docketing of Appeals. When a notice of appeal in any form has been received by the Board, it shall be docketed promptly. Notice of docketing shall be mailed promptly to all parties (with a copy of these rules to appellant).

Rule 4 Contracting Officer Appeal File. (a) Composition: Within 30 days after receipt of notice that an appeal has been docketed, the contracting officer shall assemble and transmit to the Board one copy of the appeal file with an additional copy each to appellant (except that items 1 and 2, below, need not be retransmitted to the appellant) and to attorney for respondent. The appeal file shall consist of all documents pertinent to the appeal, including:

(1) The contracting officer's decision and findings of fact from which the appeal is taken;

(2) The contract, including pertinent specifications, modifications, plans, and drawings;

(3) All correspondence between the parties pertinent to the appeal, including the letters of claim in response to which the decision was issued;

(4) Transcripts of any testimony taken during the course of proceedings, and affidavits or statements of any witnesses on the matter in dispute made prior to the filing of the notice of appeal with the Board; and

(5) Any additional information considered pertinent.

(b) Organization: Documents in the appeal file may be originals, legible facsimiles, or anthenticated copies. They shall be arranged in chronological order, where practicable, and indexed to identify readily the contents of the file. The contracting officer's final decision and the contract shall be conveniently placed in the file for ready reference.

(c) Supplements: Within 30 days after receipt of a copy of the appeal file assembled by the contracting officer, the appellant may supplement the file by transmitting to the Board any additional documents which it considers pertinent to the appeal and shall furnish two copies of such documents to attorney for respondent.

(d) Burdensome documents. The Board may waive the requirement of furnishing to the other party copies of bulky, lengthy, or out-of-size documents in the appeal file when a party has shown that doing so would impose an undue burden. At the time a party files with the Board a document as to which such a waiver has been granted, the other party shall be notified that the document or a copy is available for inspection at the offices of the Board or of the party filing the document.

(e) Status of Documents: Documents in the appeal file or supplements thereto shall become part of the historical record but shall not be included in the record upon which the Board's decision will be rendered unless each individual document has been offered and admitted into evidence.

Rule 5 *Motions.* (a) Any timely motion may be considered by the Board. Motions shall be in writing (unless made during a conference or a hearing), shall indicate the relief or order sought, and shall state with particularity the grounds therefore. Those motions which would dispose of a case shall

be filed promptly and shall be supported by a brief. The Board may, on its own motion initiate any motion by notice to the parties.

(b) Parties may respond to a dispositive motion within 20 days of receipt, or as otherwise ordered by the Board. Answering material to all other motions may be filed within 10 days after receipt. Replies to responses ordinarily will not be allowed.

(c) Board rules relating to pleadings, service and number of copies shall apply to all motions. In its discretion, the Board may permit a hearing on a motion, and may require presentation of briefs, or it may defer a decision pending hearing on both the motion and the merits.

Rule 6 *Appellants election of procedures.* (a) The election to use Small Claims (Expedited) (Rule 13) or Accelerated (Rule 14) procedures is available only to appellant. The election shall be filed with the Board in writing no later than 30 days after receipt of notice that the appeal has been docketed, unless otherwise allowed by the Board.

(b) Where the amount in dispute is $50,000 or less, appellant may elect to use the Accelerated procedures. Where the amount is $10,000 or less, appellant may elect to use the Small Claims (Expedited) or the Accelerated procedures. Any question regarding the amount in dispute shall be determined by the Board.

Rule 7 *Pleadings.* (a) *Complaint.* Within 30 days after receipt of notice that the appeal has been docketed, the appellant shall file with the Board an original and two copies of a complaint setting forth simple, concise and direct statements of each of its claims. Appellant shall also set forth the basis, with appropriate reference to contract provisions, of each claim and the dollar amount claimed, to the extent known. This pleading shall fulfill the generally recognized requirements of a complaint, although no particular form is required. A copy of the complaint shall be served upon the attorney for the respondent or, if the identity of the latter is not known, upon the General Counsel, Department of Energy, Forrestal Building, Washington, D.C. 20585. If the complaint is not filed within 30 days and in the opinion of the Board the issues before the Board are sufficiently defined, appellant's claim and Notice of Appeal may be deemed to set forth its complaint and the respondent shall be so notified.

(b) *Answer.* Within 30 days after receipt of complaint, or a Rule 7(a) notice from the Board, the respondent shall file with the Board an original and two copies of an Answer, setting forth simple, concise and direct statements of respondent's defense to each claim asserted by appellant. This pleading shall fulfill the generally recognized requirements of an Answer, and shall set forth any affirmative defenses or counterclaims as appropriate. Should the answer not be filed within 30 days, the Board may, in its discretion, enter a general denial on behalf of the respondent and the parties shall be so notified.

Rule 8 *Amendments of Pleadings or Record.* (a) The Board upon its own initiative or upon application by a party may order a party to make a more definite statement of the complaint or answer, or to reply to an answer. The application for such an order suspends the time for responsive pleadings. The Board may, in its discretion, and within the proper scope of the appeal, permit either party to amend its pleadings upon conditions fair to both parties.

(b) When issues not raised by the pleadings are tried by express or implied consent of the parties, or by permission of the Board, they shall be treated in all respects as if they had been raised in the pleadings. In such instances, motions to amend the pleadings to conform to the proof may be entered, but are not required. Similarly, if evidence is objected to at a hearing on the ground that it is not relevant to an issue raised by the pleadings, it may be admitted but the objecting party may be granted a continuance if necessary to enable it to meet such evidence.

Rule 9 *Hearing Election.* Except as may be required under Rules 13 or 14, each party shall advise the Board following service upon appellant of respondent's Answer, or a Rule 7(b) Notice from the Board, whether it desires a hearing as prescribed in Rules 20 through 23.

Rule 10 *Submission of Appeal without a Hearing.* Either party may elect to waive a hearing and to submit its case upon the record as settled pursuant to Rule 15. Waiver by one party shall not deprive the other party of an opportunity for a hearing. Submission of a case without hearing does not relieve the parties from the necessity of proving the facts supporting their allegations or defenses. Affidavits, depositions, admissions, answers to interrogatories, and stipulations may be employed to supplement other documentary evidence in the Board record. The Board may permit such submission to be supplemented by oral argument and by briefs.

Rule 11 *Prehearing Briefs.* The Board may, in its discretion, require the parties to submit prehearing briefs in any case or motion. If the Board does not require briefs, either party may, upon timely notice to the other party, furnish a prehearing brief to the Board. In any case where a prehearing brief is submitted, it shall be furnished so as to be received by the Board at least 15 days prior to the date set for hearing, and a copy shall simultaneously be furnished to the other party.

Rule 12 *Prehearing Conference.* (a) Whether the case is to be submitted under Rule 10, or heard pursuant to Rules 20 through 23, the Board may, upon its own initiative or upon the application of either party, arrange a telephone conference or call upon the parties to appear before an administrative judge for a conference to consider:

(1) Simplification, clarification, or severing of the issues;

(2) The possibility of obtaining stipulations, admissions, agreements and rulings on documents, understandings on matters already of record, or similar agreements that will avoid unnecessary proof;

(3) Agreements and rulings to facilitate discovery;

(4) Limitation of the number of expert witnesses, or avoidance with similar cumulative evidence;

(5) The possibility for settlement of any or all of the issues in dispute; and

(6) Such other matters as may aid in the disposition of the appeal including the filing of proposed Findings of Fact and Conclusions of Law, briefs, and other such papers.

(b) Any conference results not reflected in a transcript shall be reduced to writing by the Administrative Judge and the writing shall thereafter constitute part of the evidentiary record.

Rule 13 *Optional Small Claims (Expedited) Procedure.* (a) the Small Claims (Expedited) procedure for disputes involving $10,000, or less, provides for simplified rules of procedure to facilitate the decision of an appeal, whenever possible, within 120 days after the Board receives written notice of the election.

(b) Promptly upon receipt of an appellant's election of the Small Claims (Expedited) procedure in accordance with Rule 6, the assigned Administrative Judge will arrange an informal meeting or a telephone conference with both parties to:

(1) Identify and simplify the issues in dispute;

(2) Establish a simplified procedure appropriate to the particular appeal;

(3) Determine whether a hearing is desired, and, if so, fix a time and place;

(4) Establish a schedule for the expedited resolution of the appeal; and

(5) Assure that procedures have been instituted for informal discussions on the possibility of settlement of any or all of the disputes in question.

(c) Failure to request an oral hearing within 15 days of receipt of notice of the Small Claims election shall be deemed a waiver and an election to submit the case on the record under Rule 10.

(d) The subpoena power set forth in Rule 18 is available for use under the Small Claims (Expedited) procedure.

(e) The filing of pleadings, motions, discovery proceedings or prehearing procedures will be permitted only to the extent consistent with the requirement of conducting the hearing at the scheduled time and place or, if no hearing is scheduled, of closing the record at an early time so as to permit a decision of the appeal within the target limit of 120 days. The Board, in its discretion, may impose shortened time periods for any actions required or permitted under these rules, necessary to enable the Board to decide the appeal within the target date allowing whatever time, up to 30 days, that it considers necessary for the preparation of the decision after closing the record and the filing of briefs, if any.

(f) Decisions in appeals considered under the Small Claims (Expedited) procedure will be rendered by a single Administrative Judge. If there is a hearing, the presiding Administrative Judge may, exercising discretion, hear closing oral arguments of the parties and then render an oral decision on the record. Whenever such an oral decision is rendered, the Board subsequently will furnish the parties with a written transcript of the decision for record and payment purposes and to establish the date for commencement of the time period for filing a motion for reconsideration under Rule 27.

(g) Decisions of the Board under the Small Claims (Expedited) procedure shall have no

value as precedent for future cases and, in the absence of fraud, cannot be appealed.

Rule 14 *Optional Accelerated Procedure.* (a) This option makes available an Accelerated procedure, for disputes involving $50,000 or less, whereby the appeal is resolved, whenever possible, within 180 days from board notice of the election.

(b) Promptly upon receipt of appellant's election of the Accelerated procedure in accordance with Rule 6, the assigned Administrative Judge will arrange an informal meeting or a telephone conference with both parties to:

(1) Identify and simplify the issues in dispute;

(2) Establish a simplified procedure appropriate to the particular appeal;

(3) Determine whether a hearing is desired and, if so, fix a time and place;

(4) Establish a schedule for the accelerated resolution of the appeal; and

(5) Assure that procedures have been instituted for informal discussions on the possibility of settlement of any or all of the disputes in question.

(c) Failure by either party to request an oral hearing within 15 days of receipt of notice of the election under Rule 6 shall be deemed a waiver and an election to submit on the record under Rule 10.

(d) The subpoena power set forth in Rule 18 is available for use under the Accelerated procedure.

(e) The filing of pleadings, motions, discovery proceedings or prehearing procedures will be permitted only to the extent consistent with the requirement for conducting the hearing at the scheduled time and place or, if no hearing is scheduled, the closing of the record at an early time so as to permit decision of the appeal within the target limit of 180 days. The Board, in its discretion, may impose shortened time periods for any actions required or permitted under these rules, necessary to enable the Board to decide the appeal within the target date, allowing whatever time, up to 30 days, that it considers necessary for the preparation of the decision after closing the record and the filing of briefs, if any.

(f) Decisions in appeals considered under the Accelerated procedure will be rendered by a single Administrative Judge with the concurrence of another assigned Administrative Judge or an additional member in the event of disagreement.

Rule 15 *Settling the Record.* (a) The record upon which the Board's decision will be rendered consists of the documents, papers and exhibits admitted in evidence, and the pleadings, prehearing conference memoranda or orders, prehearing briefs, admissions, stipulations, transcripts of conferences and hearings, and posthearing briefs. The record will, at all reasonable times, be available for inspection by the parties at the office of the Board. In cases submitted pursuant to Rule 10 the evidentiary records shall be comprised of those documents, papers and exhibits submitted by the parties and admitted by the Board.

(b) Except as the Board, in its discretion, may otherwise order, no proof shall be received in evidence after completion of the evidentiary hearing or, in cases submitted on the record, after notification by the Board that the case is ready for decision.

(c) The weight to be attached to any evidence of record will rest within the sound discretion of the Board. The Board may in any case require either party, with appropriate notice to the other party, to submit additional evidence on any matter relevant to the appeal.

Rule 16 *Discovery—General.* (a) General Policy and Protective Orders—The parties are encouraged to engage in voluntary discovery procedures. In connection with any deposition or other discovery procedure, the Board may make any order required to protect a party or person from annoyance, embarrassment, or undue burden or expense. Those orders may include limitations on the scope, method, time and place for discovery, and provisions for protecting trade secrets or other confidential information or documents.

(b) Expenses—Each party bears its own expenses associated with discovery, unless in the discretion of the Board, the expenses are apportioned otherwise.

(c) Subpoenas—Where appropriate, a party may request the issuance of a subpoena under the provisions of Rule 18.

Rule 17 *Discovery—Depositions, Interrogatories, Admissions, Production and Inspection.* (a) When Depositions Permitted—If the parties are unable to agree upon the taking of a deposition, the Board may, upon application of either party and for good cause shown, order the taking of testimony of any person by deposition upon oral examination or written interrogatories before any officer authorized to administer oaths at the place of examination.

(b) Orders on Depositions—The time, place, and manner of taking depositions shall be as mutually agreed by the parties, or failing such agreement, as governed by order of the Board.

(c) Depositions as Evidence—No testimony taken by depositions shall be considered as part of the evidence in the hearing of an appeal until such testimony is offered and received as evidence at such hearing. It will not ordinarily be received as evidence if the deponent is present and can testify at the hearing. In such instances, however, the deposition may be used to contradict or impeach the testimony of the deponent given at the hearing. In cases submitted on the record, the Board may, in its discretion, receive depositions to supplement the record.

(d) Interrogatories, etc.—After an appeal has been filed with the Board, a party may serve on the other party: (1) Written interrogatories to be addressed separately in writing, signed under oath and answered within 30 days unless objections are filed within 10 days of receipt; (2) a request for the admission of specified facts or the authenticity of any documents, to be answered or objected to within 30 days after service. The factual statements and the authenticity of the documents shall be deemed admitted upon failure of a party, to timely respond; and (3) a request for the production, inspection and copying of any documents or objects not privileged, which are relevant to the appeal.

(e) Any discovery engaged in under this Rule shall be subject to the provisions of Rule 16.

Rule 18 *Subpoenas.* (a) Voluntary Cooperation—Each party is expected to cooperate and make available witnesses and evidence under its control without issuance of a subpoena. Additionally, parties will secure voluntary attendance of desired third-party witnesses and production of desired third-party books, papers, documents, or tangible things whenever possible.

(b) Procedure

(1) Upon request of a party and after a showing of relevance a subpoena may be issued requiring the attendance of a witness for the purpose of taking testimony at a deposition or hearing and, if appropriate, the production by the witness, at the deposition or hearing, of documentary evidence, including inspection and copying, as designated in the subpoena.

(2) The request shall identify the name, title, and address of the person to whom the subpoena is addressed, the specific documentary evidence sought, the time and place proposed and a showing of relevancy to the appeal.

(3) Every subpoena shall state the name of the Board, the title of the appeal, and shall command each person to whom it is directed to attend and give testimony, and if appropriate, to produce specified documentary evidence at a time and place therein specified. The presiding Administrative Judge shall sign the subpoena and may, in his discretion, enter the name of the witness, or the documentary evidence sought, or may leave it blank. The party requesting the subpoena shall complete the subpoena before service.

(4) Where the witness is located in a foreign country, a letter rogatory or subpoena may be issued and served under the circumstances and in the manner provided in 28 U.S.C. 1781–1784.

(c) Requests to Quash or Modify—Upon motion made promptly but in any event not later than the time specified in the subpoena for compliance, the Board may: (i) Quash or modify the subpoena if it is unreasonable and oppressive or for other good cause shown; (ii) condition denial of the motion upon payment by the person in whose behalf the subpoena was issued of the reasonable cost of producing the subpoenaed documentary evidence; or (iii) apply protective provisions under Rule 16(a).

(d) Service—

(1) The party requesting the subpoena shall arrange for service.

(2) A subpoena may be served at any place by a United States Marshal or Deputy Marshal, or by any other person who is not a party and not less than 18 years of age. Service of a subpoena shall be made by personally delivering a copy to the person named therein and tendering the fees for one day's attendance and the mileage that would be allowed in the courts of the United States. When the subpoena is issued on behalf of the United States or an officer or agency of the United States, money payments need not be tendered in advance of attendance.

(3) The party requesting a subpoena shall be responsible for the payment of fees and mileage of the witness and of the officer who serves the subpoena. The failure to make payment of such charges on demand may be

deemed by the Board as a sufficient ground for striking the testimony of the witness and any documentary evidence the witness has produced.

(e) Contumacy or Refusal to Obey a Subpoena. In case of a contumacy or refusal to obey a subpoena by a person who resides, is found, or transacts business within the jurisdiction of a United States Court, the Board will apply to the Court through the Attorney General of the United States for an order requiring the person to appear before the Board or a member thereof to give testimony or produce evidence or both. Any failure of any such person to obey the order of the Court may be punished by the Court as a contempt thereof.

Rule 19 *Time and Service of Papers.* (a) All pleadings, briefs or other papers submitted to the Board shall be filed in triplicate and a copy shall be sent to other parties. Such communications shall be sent by delivering in person or by mailing, properly addressed with postage prepaid, to the opposing party or, where the party is represented by counsel, to its counsel. Pleadings, briefs or other papers filed with the Board shall be accompanied by a statement, signed by the originating party, saying when, how, and to whom a copy was sent.

(b) The Board may extend any time limitation for good cause and in accordance with legal precedent. All requests for time extensions shall be in writing except when raised during a recorded hearing.

(c) In computing any period of time, the day of the event from which the designated period of time begins to run shall not be included, but the last day of the period shall be included unless it is a Saturday, Sunday, or a legal holiday, in which event the period shall run to the end of the next business day. Unless otherwise stated in a Rule or Board Order, dates will be met and papers considered filed when deposited in the mail system of the U.S. Postal Service, or hand-delivery is acknowledged at the Board offices.

Hearings

Rule 20 *Hearings: Time and Place.* Hearings will be held at such places determined by the Board to best serve the interests of the parties and the Board. Hearings will be scheduled at the discretion of the Board with due consideration to the regular order of appeals, the requirements for expedited or accelerated procedures and other pertinent factors. On request by either party and for good cause, the Board may, in its discretion, change the time and place of a hearing.

Rule 21 *Hearings: Notice.* The parties shall be given at least 15 days notice of time and place set for hearings. In scheduling hearings, the Board will consider the desires of the parties and the requirement for just and inexpensive determination of appeals without unnecessary delay. Notices of hearing shall be promptly acknowledged by the parties. Failure to promptly acknowledge shall be deemed consent to the time and place.

Rule 22 *Hearings: Unexcused Absence of a Party.* The unexcused absence of a party at the time and place set for hearing will not be occasion for delay. In the event of such absence, the presiding Administrative Judge may order the hearing to proceed and the case will be regarded as submitted by the absent party as under Rule 10.

Rule 23 *Hearings: Rules of Evidence and Examination of Witnesses.* (a) Nature of Hearings—Hearings shall be as informal as may be reasonable and appropriate under the circumstances. Appellant and the respondent may offer such evidence as they deem appropriate and as would be admissible under the Federal Rules of Evidence or in the sound discretion of the presiding judge. The parties may stipulate the testimony that would be given by a witness if the witness were present. The Board may require evidence in addition to that offered by the parties.

(b) Examination of Witnesses—Witnesses before the Board will be examined orally under oath or affirmation, unless the presiding Administrative Judge shall otherwise order.

Representation

Rule 24 *Appellant.* An individual appellant may appear before the Board in person, a corporation by one of its officers; and a partnership or joint venture by one of its members; or any of these by an attorney at law duly licensed in any state, commonwealth, territory, the District of Columbia, or in a foreign country. An attorney representing an appellant shall file a written notice of appearance with the Board.

Rule 25 *Respondent.* Counsel may, in accordance with their authority, represent the interest of the Government or other client before the Board. They shall file notices of appearance with the Board, and serve notice on appellant or appellant's attorney.

Board Decision

Rule 26 *Decisions.* Except as allowed under Rule 13, decisions of the Board shall be in writing upon the record as described in Rule 15 and will be forwarded simultaneously to both parties. The rules of the Board and all final orders and decisions shall be available for public inspection at the offices of the Board.

Rule 27 *Motion for Reconsideration.* (a) Motion for reconsideration shall set forth specifically the grounds relied upon to sustain the motion and shall be filed within 30 days after receipt of a copy of the Board's decision.

(b) Motions for reconsideration of cases decided under either the Small Claims (Expedited) procedure or the Accelerated procedure need not be decided within the original 120-day or 180-day limit, but shall be processed and decided rapidly.

Rule 28 *Remand from Court.* Whenever any court remands a case to the Board for further proceedings, each of the parties shall, within 20 days of such remand, submit a report to the Board recommending procedures to be followed so as to comply with the court's order. The Board shall consider the reports and enter special orders.

Dismissals

Rule 29 *Dismissal Without Prejudice.* In certain cases, appeals docketed before the Board are required to be placed in a suspense status and the Board is unable to proceed with disposition thereof for reasons not within the control of the Board. Where the suspension has continued, or may continue, for an inordinate length of time, the Board may, in its discretion, dismiss such appeals from its docket without prejudice to their restoration when the cause of suspension has been removed. Unless either party or the Board acts within three years to reinstate any appeal dismissed without prejudice, the dismissal shall be deemed with prejudice.

Rule 30 *Dismissal for Failure to Prosecute.* Whenever a record discloses the failure of any party to file documents required by these rules, respond to notices or correspondence from the Board or otherwise indicates an intention not to continue the prosecution or defense of an appeal, the Board may issue an order requiring the offending party to show cause why the appeal should not be dismissed or granted, as appropriate. If no cause, the Board may take such action as it deems reasonable and proper.

Sanctions

Rule 31 *Failure to Obey Board Order.* If any party fails or refuses to obey an order issued by the Board, the Board may issue such orders as it considers necessary to the just and expeditious conduct of the appeal, including dismissal with prejudice.

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